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Wills and Trusts

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WILLS AND TRUSTS

I. CONSTRUCTION

The South Carolina Supreme Court, in *Limehouse v. Limehouse*,[1] was faced with the problem of interpreting a portion of a will which read:

> I give and devise my farm in Stallsville, County Dorchester, State aforesaid, unto my son, Just Doar Limehouse, absolutely and forever. If, however, he should die childless (without heirs) for his widow to have farm during her lifetime then to revert to and become part of my residuary estate.[2]

The will was dated August 29, 1916 and the testatrix, Harriet Brown Limehouse, died on September 3, 1916. Five years later, the testatrix's son, Just Doar Limehouse, adopted a son, St. Elmore Limehouse, "who alone survived his adoptive father's death intestate in 1967."[3] The beneficiaries of the residuary estate of Harriet Brown Limehouse requested the court, prior to Just Doar Limehouse's death, to determine the status of the title to the property. The matter was referred to the Master in Equity who declined to consider, prior to the adoptive father's death, the question of whether or not the "childless (without heirs)" provision was satisfied by the existence of an adopted son.[3.1] The Circuit court reversed, holding that in the event of the death of Just Doar Limehouse, survived by his adopted child, he would not have died "childless (without heirs)" and the property in question would not revert and become part of the residuary estate of the testatrix. The Supreme Court, in upholding the lower court's decision, found no basis for saying the words "childless (without heirs)" expressed a clear intention on the part of the testatrix to exclude adopted children. While it is true that the general rule favors the use of the word "children" to include adopted children of the testator, and not to include adopted children if applied to persons other than the testator, this is a rule of construction and as such would yield to a contrary intention. The court regarded the parenthetical expression, (without heirs), as one "chosen wittingly, to modify and explain the word 'child-

1. 182 S.E.2d 58 (S.C. 1971).
2. Limehouse v. Limehouse, 182 S.E.2d 58 (S.C. 1971).
3. *Id.* at 59.
3.1. Record at 1, Limehouse v. Limehouse, 182 S.E.2d 58.

less' which it attends,"[4] thereby showing intent on the part of the testatrix not to exclude an adopted son.

Echols v. Graham[5] was brought under the Uniform Declaratory Judgement Act for the construction of two wills and a determination of the rights of the parties thereunder.

The Greenville News—Piedmont Company was, from 1927 until January 1, 1968, a South Carolina corporation with 1000 shares of common stock outstanding, 864 of which were held by the Peace family.

Certain members of the Peace family agreed, on May 3, 1962, not to sell their stock in the closely held corporation without first offering it to the other members of the Peace family. This stock purchase agreement was binding until July 1, 2000, and would terminate prior to that only upon the occurrence of specified conditions, one of which was merger. This condition was satisfied on September 15, 1967, when the stockholders of the Greenville News—Piedmont Company, The Ashville Citizen—Times Publishing Company, and Southeastern Broadcasting Corporation approved an agreement of merger of the three corporations, the surviving corporation to be known as "Multimedia, Inc." The effective date of the corporate merger was January 1, 1968, which was, therefore, also the date of the termination of the family agreement.

On November 19, 1967, Frances Peace Graham, one of the "Peace Stockholders" died testate. Item X of her will read in part:

> Anything in any item of this my Last Will and Testament to the contrary notwithstanding, I will and direct that all or any part of my stock in Greenville News—Piedmont Company shall be held by my Executors and Trustee subject to the provisions of the Stock Purchase Agreement among the members of the Peace Family dated May 3, 1962.[6]

The question presented to the court with regard to Item X of Mrs. Graham's will was whether the references to Greenville News—Piedmont Company stock applied to Multimedia, Inc. stock owned by her estate.

4. Limehouse v. Limehouse, 182 S.E.2d 58, 60.
5. 182 S.E.2d at 69.
6. *Id.* at 70.

The appellants asked the court to hold that Mrs. Graham intended for her stock in Multimedia, Inc. to be controlled by the family agreement. It is important to note that at the time her will was executed in 1964, there was no merger being considered. In holding that Item X imposed no restrictions on the Multimedia, Inc. stock owned by the Frances P. Graham estate, the court mentioned the cardinal rule that the purpose of a will is to ascertain the testator's intent as gleaned from the written instrument itself.[7]

Roger C. Peace, another signer of the stock purchase agreement, executed his Last Will and Testament on September 1, 1966. His will contained Paragraph X which was substantially the same as Paragraph X of Mrs. Graham's will. On August 16, 1968, he executed a codicil to his will which specifically provided that any reference made in his will to the Greenville News—Piedmont Company should be construed to mean Multimedia, Inc. The Supreme Court agreed with the ruling of the lower court that Mr. Peace had clearly expressed his intention that his Multimedia, Inc. stock should be restricted as defined in his will even though the stock purchase agreement had been terminated by merger.

The will further provided that stock which was not required to be sold in accordance with the stock purchase plan be offered first to Mr. Peace's daughter, or secondly to the corporation, or thirdly to members of the Peace family. The members of the Peace family were defined as follows:

> The members of the 'Peace Family' as used in the foregoing item of this my Last Will and Testament shall mean Laura P. Echols, Gertrude P. Leake, B.H. Peace, Jr., Frances P. Graham and the husbands and wives and the natural-born lineal descendants of any such individuals.[8]

The question which the court was asked to answer was whether a waiver of the right to purchase stock by a member of the "Peace Family", as defined in the will of Roger C. Peace, barred, in addition to the signer of the waiver, any present or future spouse of the signer, and the present or future natural-born lineal descendants of the signer.[9]

7. *Citing* South Carolina Nat'l Bank of Charleston v. Arrington, 252 S.C. 1, 165 S.E.2d 77 (1968).

8. 182 S.E.2d 69, 72 (S.C. 1971).

9. *Id.*

Again agreeing with the lower court, the Supreme Court of South Carolina held that, under the terms of Mr. Peace's will and codicil, the waiver barred any present or future spouse and any present or future natural-born lineal descendants of the signers from exercising the right to purchase the stock, as well as the signers themselves.

II. ORDER FOR PARTITION: EXECUTOR OR ADMINISTRATOR AS PARTY TO THE ACTION

Smith v. Hawkins[10] involved the application of Rule 54 of the Circuit Court Rules, which provides:

> No partition of real estate of a deceased person shall be had unless the legal representative or representatives of such deceased person be made parties to the action and it be made to appear to the court that the debts of such deceased person are fully paid, or that the personal estate in the hands of personal representative or representatives is sufficient for the payment of the debts of such deceased person, or unless in the decree due provision is made for the payment of the debts.[11]

The real estate in question consisted of one and one-fourth acres of land owned and possessed by Simpson Hawkins at the time of his intestate death in 1931. Shortly after his death, his widow, Ida Hawkins, conveyed all of her undivided one-third interest in the property to one of the four surviving children, Asa Hawkins, reserving to herself a life estate in the property. On the same day, Asa Hawkins conveyed to Ida Hawkins a life estate in all of his interest in the property.[12]

From the existing facts, it appears that Ida occupied the land until her death in 1967. An action was brought to partition the real estate and the issues were referred to a special referee who recommended that

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10. 254 S.C. 423, 175 S.E.2d 824 (1970).
11. S.C. CIR. CT. R. 54.
12. S.C. CODE ANN. § 19-52 (1962) provides:
When any person shall die without disposing of the same by will his estate, real and personal, shall be distributed in the following manner:
(1) If the intestate shall leave a widow and more than one child the widow shall take one-third of the estate and the remaining two-thirds shall be divided equally among the children. . . . In this case, Ida Hawkins took one-third and the four surviving children took one-sixth each.However, after the arrangement described above, Asa Hawkins received one-half, subject to his mother's life estate, and the remaining three children received one-sixth each.

the property be sold for partition, and the proceeds, after deducting costs, taxes and the plaintiffs' attorney's fees, be divided among the parties to the action. The question for review was the defendant's contention that "the administrators of the estates of Simpson Hawkins and Ida Hawkins were necessary parties to the action."[13]

The South Carolina Supreme Court has earlier ruled that Rule 54 of the Circuit Court Rules "is only a rule of practice, and not jurisdictional in its nature."[14] The court also relied upon a 1913 decision[15] which held that the court would not require an executor or administrator to be made a party to an action when such requirement would serve no useful purpose. In this case, any right of creditors to assert a claim against the estate of Simpson Hawkins expired long before, eliminating the necessity of the administrator's being made a party to the action. Similarly, the administrator of the estate of Ida Hawkins was not a necessary party to the partition proceeding as no claims of her estate were chargeable against the land, "she having conveyed fee simple title to her interest therein to Asa Hawkins in 1931, reserving to herself only a life estate."[16]

III. ADMINISTRATION

A. Doctrine of Relation Back

In *Kiley v. Lubelsky*[17] the question in issue concerned the plaintiff's petition to qualify as administratrix and proceed under the "relation back" theory in order to defeat the application of the statute of limitations.

Gisela B. Kiley initiated the action on February 2, 1970 as administratrix of the estate of the deceased child, John S. Woolridge. Pursuant to the provisions of South Carolina Code, Sections 10-1951 and 10-1952.[18] Mrs. Kiley brought a wrongful death suit for the benefit of

13. Smith v. Hawkins, 254 S.C. 423, 429, 175 S.E.2d 824, 827 (1970).
14. DeHay v. Smith, 118 S.C. 78, 80, 109 S.E. 800, 801 (1921).
15. Thompson v. Equitable Life Assurance Soc'y of United States Ins. Co., 95 S.C. 16, 78 S.E. 439 (1913).
16. Smith v. Hawkins, 254 S.C. 423, 175 S.E.2d 824 (1970).
17. 315 F. Supp. 1025 (D.S.C. 1970).
18. S.C. CODE ANN. § 10-1951 (1962) provides:
Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action

the deceased child's parents. The plaintiff signed a petition for appointment at the time of death, February, 1964, but her counsel at that time failed to process the appointment through the Probate Court for Charleston County. Shortly after the complaint was filed on February 2, 1970, the defendants moved for summary judgment, alleging "that no Administration for the Estate of John S. Woolridge or ancillary administration for the said John S. Woolridge, was ever made or appointed within the State of South Carolina and/or County of Charleston."[19] The defendants also moved to dismiss the complaint because of its failure to state a claim upon which relief could be granted. The District Court granted the defendant's motions based upon the admission of Mrs. Kiley's counsel that the plaintiff had received no proper appointment as administratrix of the estate of John S. Woolridge, and the rule stated in a 1959 decision[20] of the District Court, part of which reads:

> The Wrongful Death Statute of South Carolina . . . provides that such an action as the one attempted in this case, shall be brought only in the name of the administrator of the estate of the deceased, and, in my opinion that means the legally appointed administrator of the estate of the deceased person.[21]

In an attempt to prevent the termination of the action under South Carolina's six-year Statuteof Limitations,[22] the plaintiff sought the permission of the court to qualify as administratrix and proceed under the "relation back doctrine." The majority of similar cases in this country have held that appointments made after the statute has run will

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and recovery damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony. . . .

S.C. CODE ANN. § 10-1952 (1962) provides, in part:

> Every such action shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused. . . . Every such action shall be brought by or in the name of the executor or administrator of such person.

19. Kiley v. Lubelsky, 315 F. Supp. 1025, 1027 (D.S.C. 1970).
20. Westbrook v. United States Plywood Corp., 177 F. Supp. 801 (D.S.C. 1959).
21. *Id.* at 803.
22. S.C. CODE ANN. § 10-143 provides:

> Within six years:
>
> (6) An action under §§ 10-1951 to 10-1956 for death by wrongful act, the period to begin to run upon the death of the person on account of whose death the action is brought.

relate back to the original date of the appointment, thereby validating actions taken on the claim within the statutory period by the person subsequently appointed administrator. The party against whom the claim is asserted is barred from relying upon the statute of limitations as a defense to the claim.[23]

South Carolina has not followed the majority rule, the supreme court having held in *Glenn v. E.I. Dupont De Nemours & Co.*[24] that the statute of limitations could not be defeated by the "relation back" theory where there was no reason for the plaintiff to believe she had been duly appointed as administratrix, even though she had acted in good faith. In such a case, the action instituted by the plaintiff was a nullity and could not be continued under the "relation back doctrine."

The Supreme Court's close decision (3-2) in *Glenn* represented the South Carolina law on this subject at the time of *Kiley*, and was followed by the District Court as directed in *Erie Railroad v. Tompkins*.[25]

B. Domicile

In *Estate of O'Neill v. Tuomey Hospital*[26] the court applied traditional guidelines in determining the domicile of the deceased. L. Arthur O'Neill, Jr. left a will which directed that his estate be left primarily to charity. Proceedings for the administration of the estate were instituted in the Probate Court for Sumter County. The deceased's heirs-at-law objected to the jurisdiction of the court, alleging that the deceased was an inhabitant of Charleston County at the time of his death, in which case the Probate Court for Charleston County would have exclusive jurisdiction pursuant to Section 19-401 of the Code of Laws of South Carolina.[27] The probate judge for Sumter County retained jurisdiction upon concluding that the deceased was last an inhabitant

23. Kiley v. Lubelsky, 315 F. Supp. 1025, 1028 (D.S.C. 1970).

24. 254 S.C. 128,174 S.E.2d 155 (1970). *See* 22 S.C. L. REV. 607 (1970) for a review of the "relation back doctrine" and the statute of limitations as discussed in the *Glenn* case.

25. 304 U.S. 64 (1938).

26. 254 S.C. 578, 176 S.E.2d 527 (1970).

27. S.C. CODE ANN. § 19-401 (1962) provides:

> The probate of the will and the granting of administration of the estate of any person deceased shall belong to the judge of probate for the county in which such person was last an inhabitant. . . .

of Sumter County. The Circuit Court affirmed the findings of the probate judge, and from this ruling the appeal was taken.

The deceased was born in Charleston, South Carolina, where he enlisted in the Navy in June, 1917. Prior to his enlistment he was from time to time a resident of Sumter, South Carolina, where he was employed by the First National Bank of Sumter. During his time in military service he became mentally incapacitated, a condition from which he was never to recover. After being discharged in 1919, the deceased remained in government hospitals until 1965, after which time he was released to the Riverside Geriatrix Hospital in Charleston where he remained until his death in 1968.[28]

Because the domicile of a person away in military service remains unchanged, it was necessary for the court to determine the domicile of the deceased prior to his entrance into the Navy in 1917. This was accomplished by evidence which purported to show that the deceased was from time to time a resident of the City of Sumter, and was in fact employed by the First National Bank of Sumter. These ties and contacts which the deceased had with Sumter County offered sufficient support for the inference that his domicile was Sumter, thus allowing the court to affirm the findings of the probate judge.[29]

The appellants also argued that, pursuant to Section 7-205 of the Code of Laws of South Carolina,[29.1] the circuit judge should have granted their request for a trial by jury of the issue as to the county in which the deceased was last an inhabitant. The Supreme Court upheld the circuit judge's action, however, pointing out that the granting of a jury trial is discretionary under the statute, and unless a clear abuse of this discretion is shown, the ruling will not be disturbed.

IV. TRUSTS

POWER OF SALE

In *Ex Parte Guaranty Bank and Trust Company*[30] the question

28. 254 S.C. 578, 584, 176 S.E.2d 527, 530 (1970).
29. *Id.* at 586, 176 S.E.2d at 531.
29.1. S.C. CODE ANN. § 7-205 (1962) provides in part:
If there be any question of fact or title to land to be decided, issue may be joined thereon under the direction of the court and a trial thereof had by jury.
30. 255 S.C. 106, 177 S.E.2d 358 (1970).

concerned the power of the court to authorize the sale, by the testamentary trustee, of certain real property. The will creating the trust neither authorized nor specifically prohibited such a conveyance.

R.P. Byrd, Sr., owner of several hundred acres of farm land in Florence County, executed his will in 1928 and died shortly thereafter. The relevant terms of the will creating the trust estate were as follows:

> Item 3. I hereby direct the said trustees to hold the said estate hereinabove stipulated for the sole benefit of the beneficiaries to lease or rent the arable land contained in the said premises and after the payment of the usual taxes the proceeds derived therefrom the paid annually to the said beneficiaries; provided, however, that should the said beneficiaries or either of them, desire to use and occupy the premises so provided for them, individually, they shall have the right to cultivate the whole or any part of the same at their option, and to use the proceeds derived therefrom for their individual uses; in the meantime, I request the said trustees to keep an eye to the interest of the said beneficiaries and to advise and admonish them in such way as would be for their individual benefit and benefit of the said premises, which I urge shall be kept in a good state of cultivation.[31]

From 1928 until the present, the land in question had been used for agricultural purposes, yielding an annual income of approximately $3,000. On August 17, 1970, the Florence County Industrial Loan and Development Commission offered to enter into an option to purchase 124.485 acres for the sum of $473,960. The recent desirability of the land was due to the construction of the intersection of interstate highways I-20 and I-95 on the property. It was pointed out that the annual interest from the proceeds of such a sale would be in the neighborhood of $20,000. This action was then instituted by the trustees who requested that the court allow a deviation from the terms of the trust, citing a reasonable necessity as the matter of fact for authorizing the sale. It was alleged by the trustees that unless the sale was authorized the beneficiaries of the trust itself would suffer. The Master in Equity for Florence County recommended that the court direct the trustee to sign the option agreement and execute a fee simple deed to the purchaser. The unknown contingent remaindermen appealed by their guardian ad litem.

The appellants contended that the purchase offer, while attractive,

31. *Id.* at 108, 177 S.E.2d at 359.

was not sufficient grounds for a deviation from the terms of the trust. However, the court cited a 1942 decision[32] in which it held that in a case of reasonable necessity a court of equity could provide for the sale of land and it was not essential to show absolute necessity. In view of the relatively low monetary yield of the property as farm land $3,000) as compared to the projected $20,000 annual interest from the proceeds of the sale, the court concluded that the opportunity to sell the property for commercial development presented somewhat of a windfall which should be taken advantage of. In addition to the above discussed case, the court noted statutory authorization in South Carolina[33] to permit the trustee to deviate from the terms of a trust agreement.

After pointing out that the intent of the settlor was to provide for the beneficiaries, the court emphasized the difference between fulfilling this intention in 1928 and accomplishing the same result in 1970. Farming was a profitable business in 1928, and the testator's belief that the interests of the beneficiaries could best be provided for by the cultivation of farmland was well-founded. It would have been impossible for the testator to have foreseen the industrialization of the South and subsequent construction of interstate highways on his property. The court further reasoned that the failure to allow the sale of the property would defeat the overall purpose of the trust to provide for the beneficiaries:

> We think that a reasonable necessity as contemplated by the law has been shown. Sale of the property merely changes the form of the body of the trust. The beneficiaries will enjoy the income from the money and the ultimate distribution instead of enjoying the income from the land and its ultimate distribution.[34]

V. ADMINISTRATION OF AN ESTATE: PAROL EVIDENCE AND RESULTING TRUSTS

In *Wallace v. Wallace*[35] the dispute concerned the ownership of four shares of Mount Hope Cemetery stock which was registered in the

32. Wingard v. Hennessee, 206 S.C. 159, 33 S.E.2d 390 (1942).

33. S.C. CODE ANN. § 67-60 (Supp. 1970) provides:
> The provisions of §§ 67-58, 67-59 and 67-61 shall not be construed as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate from the terms of any will, agreement, or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale or management of fiduciary property.

34. 255 S.C. 106, 112, 177 S.E.2d 358, 361 (1970).

35. 182 S.E.2d 60 (S.C. 1971).

name of J.W. Wallace, Sr., at the time of his death intestate on January 10, 1928, and subsequently listed as property of the deceased's estate. One of the deceased's three sons, M.C. Wallace, the defendant, was duly appointed administrator of the estate and, upon the filing of the inventory in the office of the probate judge for Florence County, signed a sworn statement, as administrator, that the inventory was correct and contained a true statement of all property of the deceased, both real and personal.[36]

On April 30, 1928, the defendant acting as administrator of his father's estate, transferred the same four shares of Mount Hope Cemetery stock to another son of the deceased, J.W. Wallace, Jr. This transaction took place without the knowledge of either the remaining son, W.G. Wallace, the plaintiff, or the Probate Court. At the time of the transaction, the defendant claimed individual ownership of the stock. In 1961, the plaintiff requested that his brother, as administrator, make a distribution of the stock among the heirs. The defendant had been appointed administrator in 1928, and was never discharged by the Probate Court. When the requested distribution was not forthcoming, this action was instituted. The plaintiff requested that the court require the defendant to account for the plaintiff's one-third distributive share of the stock.[37] Shortly thereafter, J.W. Wallace, Jr. individually transferred the four shares to the defendant.

In his answer, the defendant alleged that the stock never actually belonged to his late father, but had been placed in his name for the following purpose:

> (S)olely to allow him to serve as President and a Member of the Board of Directors of Mount Hope Cemetery and . . . that he owned the stock individually and had continuously exercised these rights of ownership since 1925 (the time the stock was purchased by him) and that the stock was transferred from his father's estate on April 30, 1928.[38]

The matter was referred to the Master in Equity, who agreed with the trial judge that the defendant had failed to satisfactorily establish his ownership of the stock, and therefore the defendant was ordered to account to the plaintiff for his distributive share.[39]

36. Wallace v. Wallace, 182 S.E.2d 60, 62 (S.C. 1971).
37. S.C. CODE ANN. § 19-52 (1962).
38. Record at 1, Wallace v. Wallace, 182 S.E.2d 60 (S.C. 1971).
39. 182 S.E.2d at 62.

Because this action was not brought for some thirty years after the distribution of the estate could have been demanded by the plaintiff, the defendant contended that the presumption of payment doctrine barred the action:

> A lapse of twenty years or over from the time the legacy or distributive share becomes payable raises a presumption of payment or satisfaction and unless rebutted bars the claim. Nevertheless the presumption may be rebutted and the liability to account will then remain in full force.[40]

This argument failed to gain the approval of the court:

> Assuming, as contended by appellant, that a presumption of payment or distribution to the heirs of the personal property might arise from such a long lapse of time, such would not apply to the stock involved in this action. Appellant does not defend upon the ground that the stock was distributed to the heirs, but rather upon the ground that the stock was transferred from the estate under a claim of ownership by him. Such claim affords no basis for a presumption of distribution to the heirs.[41]

Although the defendant claimed ownership of the stock at the time he made the transfer to his brother, he was the court appointed administrator of an estate, the inventory of which listed that same stock among the assets. As administrator, it was his duty to advise both the court and those interested parties of his adverse claim to the stock. By failing to handle his adverse claim "in accordance with the principles governing the administration of his trust,"[42] he denied himself standing to claim that an heir demanding an accounting is guilty of laches.[43]

The defendant also based his claim of ownership of the stock upon an alleged purchase money resulting trust in his favor.[44] While it is a generally accepted principle that such a trust may be shown by parol evidence, it is equally well established that such evidence must be "clear, definite and convincing."[45] The court further qualified the establishment of such a trust by saying:

40. Brief for Appellant at 3, Wallace v. Wallace, 182 S.E.2d 60 (S.C. 1971), *quoting from* 34 C.J.S. *Executors and Administrators* § 736 (1942).
41. 182 S.E.2d at 63.
42. *Id.* at 64.
43. *Id.*
44. Brief for Appellant at 5, Wallace v. Wallace, 182 S.E.2d 60 (S.C. 1971).
45. 182 S.E.2d at 65.

> And where the claim to such a trust is based upon payment of the purchase money. . . , such payment must be clearly and unmistakably shown to have been so made at or before the time of the purchase.[46]

The defendant failed in his attempt to prove that he paid for the stock, and therefore was unable to convince the court to reverse the decisions of the master and the trial judge.

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46. *Id.* at 64, *quoting from* Privette v. Garrison, 235 S.C. 119, 127, 110 S.E.2d 17, 21 (1959).